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No. 84-443

IN THE
Supreme Court of the United States
OCTOBER TERM 1984

ERNEST N. MORIAL, *et al.*,
and the Class they Represent,
Petitioners,

vs.

UNITED GAS PIPE LINE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Of Counsel:

WILLIAM D. FISHER
SHEILA JACKSON LEE
United Gas Pipe Line Company
P.O. Box 1478
Houston, Texas 77001

PIERSON SEMMES CROLIUS
AND FINLEY
1054 Thirty-first Street, N.W.
Washington, D.C. 20007

LEMLE, KELLEHER, KOHLMEYER,
HUNLEY, MOSS & FRILOT
601 Poydras Street
New Orleans, Louisiana 70130

W. DEVIER PIERSON
KNOX BEMIS
JAMES M. COSTAN
(Counsel of Record)
1054 Thirty-first Street, N.W.
Washington, D.C. 20007
(202) 333-4000

C. MURPHY MOSS, JR.
ROBERT G. MCIVER
601 Poydras Street
New Orleans, Louisiana 70130

Counsel for Respondent

October 19, 1984

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit properly followed Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), in ruling that under Louisiana law the Petitioners are not third party beneficiaries of the power-plant gas contract between United Gas Pipe Line Company and New Orleans Public Service Inc.
2. Whether an economic interest in the outcome of litigation, without more, will support intervention of right in a contract action.
3. Whether the trial court's denial of permissive intervention constituted a clear abuse of discretion.

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UNITED GAS PIPE LINE COMPANY,

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Rule 22 of the Rules of this Court, Respondent United Gas Pipe Line Company ("United") submits this brief in opposition to the petition for a writ of certiorari filed by the purported class of

ratepayers of New Orleans Public Service Inc. and the Mayor and members of the City Council of New Orleans (referred to collectively as "Petitioners"), seeking review of the opinion of the Fifth Circuit in this case. The Fifth Circuit's opinion is reported at 732 F.2d 452 and is included in the petition for certiorari as Appendix H. As set out below, United respectfully requests that the writ be denied because Petitioners have presented no issue that warrants review by this Court.

STATEMENT OF THE CASE

This case involves questions relating to intervention under Rule 24 of the Federal Rules of Civil Procedure. The underlying lawsuit is a contract price dispute between United, a natural gas transmission company, and New Orleans Public Service Inc. ("NOPSI"), an electric utility, over the price of natural gas delivered to NOPSI's

powerplants.[1] The Petitioners moved to intervene in the action both as a matter of right under Rule 24(a)(2) and permissively under Rule 24(b). Petitioners seek intervention solely to assert rights under the contract between United and NOPSI. In this respect, they advance no separate claim of their own but simply adopt the allegations of NOPSI's complaint. 732 F.2d at 465-66.

The district court denied intervention, and the Fifth Circuit (en banc) affirmed. The Fifth Circuit held that the Petitioners do not have a sufficient interest to support intervention because they are not third party beneficiaries of the contract in dispute and because an economic interest in the outcome of the litigation,

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1/ United's statement identifying affiliated companies pursuant to Rule 28.1 is appended hereto. A statement identifying the affiliates of NOPSI, a wholly-owned subsidiary of Middle South Utilities, Inc., has been lodged with the Court.

without more, will not support intervention of right. The Court ruled further that the trial court did not commit a clear abuse of discretion in denying permissive intervention because the Petitioners do not have a legally protectable interest in the contract between United and NOPSI, because whatever interest Petitioners have is adequately represented by NOPSI, and because intervention by Petitioners would prejudice the rights of the existing parties to the action. The Fifth Circuit's en banc opinion denying intervention was unanimous on all but one point, the issue of permissive intervention by the New Orleans city officials. On that issue, five of the 15 judges sitting on the Court dissented, arguing that the Court should depart from existing precedent. 732 F.2d at 474.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT DID NOT DEVIATE FROM ERIE RAILROAD CO. V. TOMPKINS IN HOLDING THAT THE PETITIONERS ARE NOT THIRD PARTY BENEFICIARIES OF THE CONTRACT BETWEEN UNITED AND NOPSI.

The Petitioners raise no question worthy of this Court's review in asserting that the Fifth Circuit failed to heed Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), in holding that Petitioners are not third party beneficiaries of the contract between United and NOPSI. The Fifth Circuit's interpretation of Louisiana law reflects the unanimous judgment of the 15 members of the en banc court and, besides being correct, does not constitute a federal question subject to review under Rule 17.1 of the Rules of this Court.

The Petitioners are simply wrong in their assertion that the Louisiana courts have already determined that they are third

party beneficiaries of the NOPSI-United contract. Conspicuously absent from their petition for certiorari is the citation or quotation of any such holding by the Louisiana courts. Indeed, the sole authorities relied upon by Petitioners are unreported orders that do not even discuss the third party beneficiary issue, much less purport to decide it.[2]

It is well settled that unreported opinions of state courts are not binding in a diversity case, and that unreported orders

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2/ This is well illustrated in the recent judgment of the state trial court cited by Petitioners (Pet. 23-24), in which the trial judge refused to incorporate in his reasons for judgment a finding that NOPSI's ratepayers are third party beneficiaries of the NOPSI-United contract, even though the ratepayers strenuously advocated such a finding in their post-trial briefs. Similarly, in the November 28, 1981 order of the Louisiana Court of Appeal, Fourth Circuit, cited by Petitioners (Pet. 23), the quoted language relates to the certification of a class action. Nowhere in its order did the Court discuss the third party beneficiary issue.

containing no discussion of the issues or statements of rationale are entitled to no weight whatsoever. King v. Order of United Commercial Travelers, 333 U.S. 153, 161 (1948); McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 662 (3rd Cir.), cert. denied, 449 U.S. 976 (1980); Connecticut State Federation of Teachers v. Board of Education Members, 538 F.2d 471, 485 (2d Cir. 1976); Guinand v. Atlantic Richfield Co., 485 F.2d 414, 417 (10th Cir. 1973); American Fidelity & Casualty Co. v. Indemnity Insurance Co., 308 F.2d 697, 699 (6th Cir. 1962), cert. denied, 372 U.S. 942 (1963). In the absence of a final decision of the Louisiana courts on the third party beneficiary issue, the Fifth Circuit's responsibility under Erie was to decide the question on the basis of the principles enunciated in the reported decisions of the Louisiana Supreme Court and the Louisiana Courts of Appeal. See Gooding v. Wilson, 405 U.S. 518, 525 n.3 (1972);

West v. A.T.&T. Co., 311 U.S. 223, 236-38 (1940); Six Companies of California v. Joint Highway District, 311 U.S. 180, 187-88 (1940). This is precisely what the Court did in its thorough and well-reasoned opinion. 732 F.2d at 466-69.

The Petitioners have not raised any issue under Erie. The Fifth Circuit's determination of the third party beneficiary issue is purely a matter of Louisiana law and is not reviewable under Rule 17.1.

II. THERE IS NO CONFLICT IN THE CIRCUITS ON THE PROPOSITION THAT AN ECONOMIC INTEREST IN THE OUTCOME OF LITIGATION, WITHOUT MORE, WILL NOT SUPPORT INTERVENTION OF RIGHT IN A CONTRACT ACTION.

Petitioners assert that even if they do not possess any substantive legal rights under the contract between United and NOPSI, they are entitled to intervene on the basis of an economic interest in the outcome of the litigation. This argument was

unanimously rejected by the Fifth Circuit en banc. 732 F.2d at 463-66. Nevertheless, Petitioners seek review in this Court on the asserted ground that there is confusion in the circuits on the economic interest question and that guidance from this Court is necessary to obtain more uniform results. (Pet. 15.)

The confusion suggested by Petitioners, however, is completely nonexistent. Indeed, in their petition for certiorari, Petitioners have not cited or discussed a single case in which a circuit court has allowed intervention in a contract action solely on the basis of an economic interest in the outcome. Thus, they have not presented any issue worthy of this Court's consideration under Rule 17.1; they merely seek what amounts to appellate review of the Fifth Circuit's judgment against them. On this basis alone, their petition for certiorari should be denied.

The courts have used various terms to identify the type of interest necessary to support intervention of right under Rule 24(a)(2). Some courts have termed the requisite interest a "significantly protectable interest,"[3] while others have termed it a "direct, substantial, legally protectable interest,"[4] and still others have termed it a "direct, as opposed to contingent or remote interest."[5] Finally, some courts have declined to adopt any specific formulation,

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3/ Donaldson v. United States, 400 U.S. 517, 531 (1971).

4/ E.g., New Orleans Public Service Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463-64 (5th Cir. 1984) (instant case); Westlands Water Dist. v. United States, 700 F.2d 561, 563 (9th Cir. 1983); Dilks v. Aloha Airlines, 642 F.2d 1155, 1156-57 (9th Cir. 1981); Meridian Homes Corp. v. Nicholas W. Prassas & Co., 683 F.2d 201, 204 (7th Cir. 1982); Heyman v. Exchange Nat'l Bank of Chicago, 615 F.2d 1190, 1193 (7th Cir. 1980); Athens Lumber Co. v. Federal Election Comm'n, 690 F.2d 1364, 1366 (11th Cir. 1982).

5/ E.g., Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc., 725 F.2d 871, 874 (2d Cir. 1984).

but instead have attempted to analyze the interest requirement in each case in light of the underlying policies of Rule 24.[6]

These differences in formulations, however, do not mean that the courts have reached, or will reach, different results when confronted with the same issue. Indeed, what one court may characterize as an "indirect or contingent interest," another may characterize as an interest that is not "legally protectable."[7] In both cases,

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6/ E.g., Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967); Sanguine Ltd. v. United States Dept. of Interior, 736 F.2d 1416 (10th Cir. 1984); Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849 (10th Cir. 1981); SEC v. Flight Transportation Corp., 699 F.2d 943 (8th Cir. 1983).

7/ Compare Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, 725 F.2d 871 (2d Cir. 1984) (intervention denied on basis that interest was not direct but contingent or remote), with Meridian Homes Corp. v. Nicholas W. Prassas & Co., 683 F.2d 201 (7th Cir. 1982) (intervention denied on basis that interest was not direct and substantial and therefore was not legally protectable).

however, the result is the same -- denial of intervention.

The flaw in Petitioners' argument is that they have made no showing -- nor are they able to show -- that there is any conflict in the circuits on results with regard to the issue presented in this case, i.e., whether a mere economic interest in the outcome of litigation is sufficient to support intervention of right in a contract action.[8] On this point, there are no differences in

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8/ Petitioners miscite Commonwealth Edison Co. v. Allis Chalmers Mfg. Co., 315 F.2d 564 (7th Cir. 1963), cert. denied sub nom. Illinois v. Commonwealth Edison Co., 375 U.S. 834 (1964), in arguing that that case stands for the proposition that an economic interest in the outcome will support intervention. (Pet. 19.) In Commonwealth Edison, the court denied intervention by the State of Illinois despite the economic interest of its citizens because the State and its citizens lacked standing to raise the antitrust claims that formed the subject matter of the main action. It was on the basis of precisely this same lack of standing that the Fifth Circuit denied intervention by Petitioners in the instant contract dispute.

the circuits at all. The courts that have addressed the issue have uniformly denied intervention where the applicant was unable to demonstrate that it possessed substantive rights with regard to the contract in issue. E.g., Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc., 725 F.2d 871 (2d Cir. 1984) (intervention by defendant's insurer denied in suit for breach of contract and warranties where insurer did not have rights in contract forming subject matter of main action but only in coverage provisions of insurance contract with defendant); Westlands Water District v. United States, 700 F.2d 561 (9th Cir. 1983) (intervention by environmental group denied in contract action where it was not party to contract forming subject matter of main action); Meridian Homes Corp. v. Nicholas W. Prassas & Co., 683 F.2d 201 (7th Cir. 1982) (intervention by owners of profits interests in joint venture denied in suit for

dissolution where only partners in joint venture possessed substantive rights with regard to dissolution proceedings); Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849 (10th Cir. 1981) (intervention by coal lease owner denied in action challenging terms under lease to which applicant for intervention was not a party); Moosehead Sanitary District v. S. G. Phillips Corp., 610 F.2d 49 (1st Cir. 1979) (intervention by State of Maine denied in contract action involving contract to which State was not a party or a third party beneficiary).

The decision of the Fifth Circuit in the instant case is consistent with the foregoing cases from the other circuits and also with the decision of this Court in Donaldson v. United States, 400 U.S. 517 (1971), the only decision of this Court to address the meaning of the interest requirement under Rule 24(a)(2). Donaldson dealt with the attempted intervention by a taxpayer

(Donaldson) in an Internal Revenue Service summons proceeding directed at obtaining documents in the possession of Donaldson's accountant. Even though Donaldson clearly had an economic interest in the outcome of the proceeding, the Court upheld the denial of intervention. It ruled that Donaldson's interest was not "significantly protectable" because the documents in question were not the property of Donaldson, but of his accountant, and because Donaldson did not have any claim of privilege with respect to such documents. Id. at 530-31.

As in Donaldson, intervention in the instant case was also properly denied. Even though Petitioners may have an economic interest in the outcome of the litigation, their interest is not such as to justify granting them status as a party under Rule 24(a)(2), because they do not possess any substantive legal rights under the contract between United and NOPSI.

Petitioners have made no showing that the decision of the Fifth Circuit is in conflict with the decisions of other circuits or with the decisions of this Court. Their request for a writ of certiorari on the economic interest question should therefore be denied.

III. THE DISTRICT COURT DID NOT COMMIT A CLEAR ABUSE OF DISCRETION IN DENYING PERMISSIVE INTERVENTION.

Under Rule 24(b), the decision whether to grant or deny a motion for permissive intervention is discretionary with the district court, and an order denying permissive intervention will be reversed only on a showing of "clear abuse" of discretion. Allen Calculators Inc. v. National Cash Register Co., 332 U.S. 137, 142 (1944). Applying this standard, the Fifth Circuit upheld the denial of permissive intervention in this case on the grounds that Petitioners do not

have a legally protectable interest in the contract action between United and NOPSI, that whatever interest they have is adequately represented by NOPSI, and that intervention by Petitioners would prejudice the rights of the original parties to the action. 732 F.2d at 472-73. Its holding is supported by both the plain language of Rule 24(b)[9] and by the decisions of other circuit courts.[10]

9/ Fed. R. Civ. P. 24(b) ("In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.").

10/ Athens Lumber Co. v. Federal Election Comm'n, 690 F.2d 1364, 1367 (11th Cir. 1982) (denial of permissive intervention upheld because of remoteness of proposed intervenor's interest); Westlands Water Dist. v. United States, 700 F.2d 561, 563 (9th Cir. 1983) (denial of permissive intervention upheld because of proposed intervenor's lack of legally protectable interest); Hoots v. Pennsylvania, 672 F.2d 1133, 1136 (3rd Cir. 1982) (denial of permissive intervention upheld because of adequacy of representation of proposed intervenor's interest); United States

Petitioners have shown no basis for review of the denial of permissive intervention. Their argument that adequacy of representation should not be a factor in the exercise of discretion by the district court (Pet. 24-25) ignores the decisions of a number of circuit courts on permissive intervention,[11] and also ignores the other grounds relied upon by the Fifth Circuit in support of its holding. Petitioners' further argument that the Fifth Circuit's ruling is "mechanical" and "without analysis" (Pet. 27) simply shows that Petitioners are dissatisfied with the result; it does not show any

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(footnote cont'd)

Postal Service v. Brennan, 579 F.2d 188, 191-92 (2d Cir. 1978) (denial of permissive intervention upheld because of adequacy of representation of proposed intervenor's interest); Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977) (adequacy of representation is a factor to be considered by district court in ruling on motion for permissive intervention).

11/ Cases in note 10, supra.

basis for review by this Court. Furthermore, contrary to Petitioners' suggestion, the discussion in the opinion is thorough and well-reasoned.

The true thrust of Petitioners' argument is that a district judge has no discretion to deny intervention in a case where the outcome may affect the economic interests of consumers. Citing the decision of the D.C. Circuit in Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), Petitioners suggest that consumers' interests are paramount and that consumers must be allowed to intervene in order to have a forum for the presentation of their views. (Pet. 27-28.) Petitioners' argument, however, has no support whatsoever and completely ignores the requirements of Rule 24.

First, Petitioners' citation of United Church of Christ is inapposite, inasmuch as that case did not involve intervention in a

proceeding in federal court, but involved intervention in a broadcast licensing proceeding before the Federal Communications Commission. The fact that consumers have standing to intervene in an administrative proceeding conducted under a statute designed to promote the public interest in broadcasting has nothing to do with whether consumers have standing to intervene in a private contract action in federal court involving a contract under which the consumers have no substantive rights.

Second, Petitioners' suggestion that they do not have a forum for the presentation of their views is factually incorrect. Petitioners simply ignore the fact that the State of Louisiana has established an elaborate scheme for the regulation of public utilities such as NOPSI, and that consumers are entitled to participate in all levels of regulatory proceedings, including proceedings for determining the rate treatment

of fuel costs incurred by NOPSI. See 732 F.2d at 460 n.19, 472 n.41. Petitioners also ignore the fact that even apart from participation in regulatory proceedings affecting NOPSI's rates, they are free to participate in the proceedings before the district court in the instant case as amici curiae. 732 F.2d at 473. Indeed, the alternative means that the Petitioners do have for presentation of their views is a further reason why denial of permissive intervention was no abuse of discretion.

Finally, Petitioners' suggestion that the interests of consumers are paramount ignores the requirement under Rule 24(b) that the district court must consider the prejudicial effects of intervention on the original parties. Indeed, the prejudice in this case in terms of limiting United and NOPSI in the conduct of the litigation and in the exercise of their prerogatives to settle or terminate

their dispute was a major factor in the denial of permissive intervention:

> The effect on the existing parties is also to be considered. When the intervention is for all purposes with full party rights - and that is all that was sought below or has been urged on appeal - the control of the original parties over their own lawsuit is significantly diminished, at least where, as here, an essentially single, indivisible claim forms the only subject matter of the suit. See Wright & Miller, Federal Practice and Procedure: Civil § 1920 at 611 ("Unless conditions have been imposed, the intervenor is treated as if he were an original party and has equal standing with the original parties."). NOPSI and United clearly had the power to settle their differences without permission of the City officials, if suit had not been filed. Yet, if the City officials are granted the intervention they seek they could prevent any settlement between NOPSI and United, or prevent those parties from simply accepting a judgment of the district court by allowing it to become final without appeal. Where the intervenors do not have a legally protectable interest, are adequately represented by an existing party and will not add to the relevant factual development of the case, the position of amicus may be considered more appropriate than an

> intervention with full-party status, if, as here, such intervention may materially diminish the original parties' rights.

732 F.2d at 473.

The Fifth Circuit's ruling on permissive intervention was correct, and Petitioners have shown no basis for review by this Court.

CONCLUSION

For the reasons stated above, United respectfully requests that the petition for a writ of certiorari be denied in all respects.

Respectfully submitted,

James M. Costan

W. DeVIER PIERSON
KNOX BEMIS
JAMES M. COSTAN
(Counsel of Record)
1054 Thirty-first Street, N.W.
Washington, D.C. 20007
(202) 333-4000

C. MURPHY MOSS, JR.
ROBERT G. McIVER
601 Poydras Street
New Orleans, Louisiana 70130

Counsel for Respondent

Of Counsel:

WILLIAM D. FISHER
SHEILA JACKSON LEE
United Gas Pipe Line Company
P.O. Box 1478
Houston, Texas 77001

PIERSON SEMMES CROLIUS
AND FINLEY
1054 Thirty-first Street, N.W.
Washington, D.C. 20007

LEMLE, KELLEHER, KOHLMEYER,
HUNLEY, MOSS & FRILOT
601 Poydras Street
New Orleans, Louisiana 70130

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APPENDIX
(Rule 28.1 Statement)

RESPONDENT'S RULE 28.1. STATEMENT

Pursuant to Rule 28.1 of the Rules of this Court, Respondent United Gas Pipe Line Company ("United") hereby provides this statement concerning the identity of companies affiliated with United. United is a wholly-owned subsidiary of United Energy Resources, Inc. ("UER"). The following are affiliates and subsidiaries of United and UER:

- Alabama Gulf South Pipeline Company, Inc.
- Alabama Methane Production Company
- Cotton Petroleum Corporation
  - United Crude Company (formerly Creole Crude Company)
  - Cotton Petroleum Canada, Limited (Canada)
  - Ione Gas Processing Company
  - Lake Energy Gathering, Inc.
    - Lake Murray Partnership (a joint venture)
  - Wewoka Exploration Company

Cotton Limited Partnerships
Florida Gulf South Pipeline Company
Gulf South Pipeline Company
Mississippi Gulf South Transmission Company
PetroUnited, Inc.
PetroUnited Products, Inc.
Live Oak Plant Partnership (a partnership)
PetroUnited Terminals, Inc.
Unitex Hydrocarbons, Inc.
South Gulf Management, Inc.
South Gulf Management, Inc. of Florida
Texas Gulf South Pipeline Company
UER Gas Trading, Inc.
UER Overseas Finance N.V. (Netherland Antilles)
UER Services, Inc. (formerly United Enertrade (U.S.), Inc.)
United Energy Services Company
J. W. Gibson Well Service Company
Mercury Drilling Company
United Gas Pipe Line Company
Texas Offshore Pipeline System, Inc.
High Island Offshore System (HIOS) (a partnership)
Trans-Anadarko Pipeline Company
Trans-Anadarko Pipeline System (a partnership)
United Alaska Fuels Corporation
Alaskan Northwest Natural Gas Transportation Company (a partnership)
United LNG Company
United Mid-Continent Pipeline Company
Northern Border Pipeline Company (a partnership)

United Offshore Company
Sea Robin Pipeline Company
(a joint venture)
Unitex Offshore Transmission Company
U-T Offshore System (UTOS)
(a partnership)
U G P L Service Company
United Overseas Services, Inc.
Petro-UER AG (Switzerland)
Antwerp Gas Terminal V.G.N.
(Belgium) (a partnership)
UER AG (Switzerland)
(formerly Enertrade AG)
UER International Limited
(England) (formerly UER (UK)
Limited and Enertrade Services
Limited)
UER Petro-Products AG (Switzerland)
United Overseas, Limited (Cayman
Islands)
United Texas Transmission Company
Coastline Gas Pipeline Company
South Gulf Energy, Inc.
Texas Industrial Energy Company
United Texas South Plains, Inc.
Palo Duro Pipeline Company, Inc.
South Plains Energy, Inc.
Tiltex Gas Company
Western Energy Transport Company

James M. Costan
Counsel for Respondent
United Gas Pipe Line Company

CERTIFICATE OF SERVICE

Pursuant to Rule 28.3 of the Rules of this Court, I, James M. Costan, a member of the bar of this Court, hereby certify that I have this day served three copies of the foregoing document upon counsel of record for Petitioners by placing same in the United States mail, first class postage prepaid, addressed as follows:

Constance Charles Willems, Esq.
McGlinchey, Stafford, Mintz,
Cellini & Lang
643 Magazine Street
New Orleans, Louisiana 70130

I further certify that all parties required to be served in this proceeding have been served.

Dated at Washington, D.C. this 19th day of October 1984.

James M. Costan

James M. Costan
Counsel for Respondent
United Gas Pipe Line Company